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Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 172

MOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIL, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

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No. .....

HOLLY JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF JOSEPH HENRY FAIR, DECEASED, PETITIONER,

versus

MORGAN F. LIVINGSTON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit dated and entered in this case on the 13th day of March, 1963.

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (App. 23) is reported in 315 F. (2d) 429.

JURISDICTION

The judgment of the Court of Appeals was entered on the 13th day of March, 1963. Petition for Rehearing was denied on the 2nd day of May, 1963. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Does a Court of Appeals have the power to set aside a jury verdict for a plaintiff rendered in a case based upon two or more independent statements of claim in the alternative and direct entry of judgment for a defendant where the defendant does not move for judgment *non obstante veredicto* or a new trial as to each alternative and independent statement or theory of claim but merely moves for judgment *non obstante veredicto* on a ground specifically directed to only one statement or theory of claim not of decisive importance?

2. If such power does exist, was its exercise appropriate in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the United States Constitution, Amendment VII; 28 U. S. C., Federal Rules of Civil Procedure, Rule 8(e)(2), Rule 41(a)(2), Rule 50(a)(b), Rule 59(a)(b) and (d); and the Code of Laws for South Carolina, 1962, Volume 2, page 224, Section 10-679. They are printed in Appendix, *infra*, pp. 21-22.

STATEMENT

Petitioner, a resident of North Carolina, as Administrator of the Estate of Joseph Henry Fail, deceased, brought suit for wrongful death against the respondent, Morgan F. Livingston and others, residents of South Caro-

lina, in Federal District Court to recover damages for respondent's own negligence and for the negligence of his employee allegedly imputable to him under the doctrine of *respondeat superior*, resulting in the death of petitioner's intestate who was riding as a passenger in an automobile which collided with respondent's stake body truck while it was stopped crosswise on the highway without lights in the path of travel of oncoming motorists after the driver lost control thereof when it was being towed by another truck of respondent. The action was brought for the benefit of the mother and father of petitioner's intestate, as beneficiaries under the Wrongful Death Statute of South Carolina.

The complaint, as permitted by Rule 8(e)(2) of the Federal Rules of Civil Procedure and the South Carolina Statute, Section 10-679 of the South Carolina Code, set forth more than one statement of a claim alternatively, either one of which if made independently would be sufficient. One statement of claim was based upon the liability of respondent under the doctrine of *respondeat superior* as principal for the acts of the driver of his truck who allegedly was his agent. The other independent statement of claim was based upon the liability of respondent for his own negligence in allowing his "defective truck to be operated upon the highways of this state when he knew or should have known that it was in an unsafe condition."

The evidence adduced at the trial of this case on the issue of respondent's own negligence showed (1) that respondent's stake body truck was stopped on the highway without lights and reflectors at the time of the collision (App. 30) resulting in the death of plaintiff's intestate, (2) that the truck had been in such defective condition for at least a week prior to the collision (App. 30, 31), (3) that respondent's employee was notified of such condition and

during such period of time respondent saw or could have seen that the truck was defectively equipped with lights and reflectors (App. 30, 31, 32); and (4) that respondent allowed the truck to be operated on the highway in the nighttime (App. 31, 33).

The evidence on the issue of liability based upon the doctrine of *respondeat superior* showed (1) that *res gestae* statements were made by the employee-driver of respondent to the effect that he was acting as the agent of the respondent (P. A.,* pp. A-1, A-8, A-10), (2) that at the time of the collision the respondent's trucks were in the possession of the employee-driver who was using one of the trucks to tow to respondent's place of business another truck of his which had become disabled on the highway in the nighttime, and (3) that the employee-driver was permitted by respondent to use the truck in the nighttime (App. 31, 33).

At the conclusion of the case respondent did not question the legal sufficiency of the evidence as to the issue of respondent's own negligence. The only evidence he questioned was that produced as to the issue of liability based upon the doctrine of *respondeat superior* by his motion for a directed verdict made on the specific ground that there was no evidence that the drivers of respondent's trucks were the agents or servants of respondent at the time of the collision. The District Judge denied the motion and after submission of the case to the jury a verdict in the sum of $15,000.00 was returned in favor of petitioner against the respondent and the drivers of the trucks.

Thereafter, respondent moved for judgment *non obstante veredicto* in accordance with his motion for directed verdict on the specific ground which questioned the legal sufficiency of the evidence only on the issue of defendant's

* "P. A." refers to plaintiff-appellee's Appendix filed in the Court below.

alleged liability based upon the doctrine of *respondeat superior* (App. 34). The ground of respondent's motion for judgment *non obstante veredicto* did not question the legal sufficiency of the evidence on the issue of respondent's own negligence nor was any motion for judgment notwithstanding the verdict or for a new trial made by respondent on this issue. The District Judge overruled the motion.

Upon appeal, the Court of Appeals reached the conclusion, from its own view of the testimony and particularly on the basis of the hearsay and self-serving declarations of respondent to which objection was interposed by petitioner in the trial Court, that the evidence was legally insufficient "to warrant the jury in holding that Barnes was an agent or employee of Livingston acting within the scope of his agency or employment at the time of the accident."

The Court of Appeals did not stop there, however, to consider that no pre-verdict and post-verdict motions were directed toward the alternative independent claim of liability against the respondent based upon his own negligence and, therefore, the legal sufficiency of the evidence on the issue pertaining to this alternative claim was not subject to review or, at the least, could not, in accordance with the decisions of this Court, form the basis for entry of judgment for respondent. Instead, it proceeded to review the evidence on this issue, determined that it was insufficient, and remanded the case with direction to enter judgment for respondent. Yet, nowhere in its somewhat detailed opinion was there any discussion of the propriety of reviewing the legal sufficiency of evidence on this decisive issue which was not questioned in the District Court or of directing entry of judgment for respondent. Petition for Rehearing was filed, pointing out the impropriety of directing entry of judgment for respondent (App. 28), but was

denied by the Court below on the 2nd day of May, 1963. (App. 37.)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal procedure which has not been, but should be, settled by this Court.

This case presents for the first time in this Court the question of whether a motion for judgment *n. o. v.* made on a ground specifically directed to only one of two statements of claim in the alternative, and denied in the District Court, can form the basis of a judgment *n. o. v.* by an Appellate Court as to the whole case, notwithstanding the absence of pre-verdict and post-verdict motions directed to the other statement of claim of decisive importance.

This Court on a number of occasions since the adoption of the Federal Rules of Civil Procedure has considered the impact of Rule 50(b) on the power of a Court of Appeals to direct entry of judgment in favor of a party who lost in the District. In *Cone v. West Virginia Pulp and Paper Co.*, 330 U. S. 212, and *Globe Liquor Co. v. San Roman*, 332 U. S. 571, there were pre-verdict motions for a directed verdict and post-verdict motions for a new trial, but not for judgment *n. o. v.* In *Weade v. Dichmann, Wright & Pugh*, 337 U. S. 801, which involved an action based upon two statements of claim in the alternative, it appears, although the opinions of the Court of Appeals and this Court do not clearly indicate, that there was a pre-verdict motion for directed verdict and a post-judgment motion for judgment *n. o. v.* or new trial directed to both theories of plaintiff's claim; but since the Court of Appeals' direction of verdict was based upon the untenability of only one theory of claim and not the other, this Court reversed. In *Johnson v. N. Y., N. H. & H. R. Co.*, 344 U. S. 48, there was a pre-

verdict motion for directed verdict and a post-verdict motion which the Court of Appeals construed as a motion for judgment *n. o. v.* On certiorari to this Court it was held that the motion was not in accordance with the precise plan of Rule 50(b) and, therefore, had no legal efficacy to form the basis for a judgment *n. o. v. Fountain v. Filson*, 336 U. S. 681, involved the entry of a summary judgment in favor of a party by the Court of Appeals on an issue as to which the opposite party had no opportunity to present a defense before the trial Court. Based upon the rationale of *Cone v. West Virginia Pulp & Paper Co.* and *Globe Liquor Co. v. San Roman*, this Court reversed the entry of judgment.

The present case in which there were no pre-verdict and post-verdict motions directed to an issue of decisive importance presents an equally important facet of the same general problem.

Rule 8(e)(2) authorizes a plaintiff to set forth in his complaint two or more independent statements of claim in the alternative. In accordance therewith, petitioner's case was based upon two independent statements of claim in the alternative. As to one independent claim there were no pre-verdict and post-verdict motions. The only motion made by respondent for judgment *n. o. v.* was on a ground based on the particular legal theory that the evidence on only one independent theory of claim was legally insufficient.

Consequently, when the Court of Appeals directed entry of judgment *n. o. v.* for respondent, notwithstanding the requirement of Rule 50 that a pre-verdict and post-verdict motion "shall state the specific grounds therefor", it held by necessary implication that the petitioner by framing his complaint in accordance with Rule 8(e)(2) took the risk of being deprived of the opportunity of making a showing for the exercise of the District Judge's discretion vested in

him under Rules 41(a)(2) and 50(b) as to an issue of decisive importance not questioned in the Court below. Just as this Court in *Johnson v. N. Y., N. H. & H. R. Co.*, 344 U. S. 48, reasoned and concluded that the purported motion for judgment *n. o. v.* therein was inadequate to afford a basis for judgment *n. o. v.*, so likewise in the case at bar, in accordance with principles of fairness and justice to give litigants an opportunity to make a showing and District Judges the opportunity to exercise the discretion vested in them as to issues of decisive importance in the trial Court, a Court of Appeals should not be permitted to direct entry of judgment *n. o. v.* on a ground not presented before the trial Court.

It, thus, appears that the Court below has in this case decided an important question of federal procedural law which has not, but should be, settled by this Court.

The importance of the Rules to secure a just, speedy and inexpensive determination of every action makes it important and desirable that this Court inform bench and bar whether the practice of setting forth in a complaint independent statements of a claim in the alternative, in accordance with Rule 8(e)(2), has the effect of nullifying the requirement of Rule 50 that motions made thereunder "shall state the specific grounds therefor", and operates to deny litigants the opportunity of making a showing and District Judges the opportunity of exercising the powers and duties vested in them under Rules 41(a)(2) and 50(b) as to issues of decisive importance.

2. The decision of the Court of Appeals in directing entry of judgment for respondent is in conflict with Rule 50(a) and (b) of the Federal Rules of Civil Procedure and the decisions of this Court in which the rule has been construed.

The issues in this case are (1) whether a Court of Appeals, by directing entry of judgment *n. o. v.* against a party who won in the trial Court, has the power to deny him the opportunity of making a showing and the District Judge the opportunity of exercising the discretionary powers vested in him under Rules 41(a)(2) and 50(b) as to an issue of decisive importance which they had no occasion to exercise because the legal sufficiency of such issue was not questioned in the Court below; (2) whether a Court of Appeals has the power to review the legal sufficiency of evidence on an issue of decisive importance in the absence of a motion for a directed verdict, judgment *n. o. v.*, or for a new trial; and (3) whether a Court of Appeals has the power to weigh conflicting inferences and judge the credibility of witnesses.

On the first issue the decision of the Court below is in direct conflict with an unbroken line of decisions of this Court holding that Rule 50(b) of the Federal Rules of Civil Procedure forbids the Trial Judge or an Appellate Court to direct entry of judgment in favor of an appellant who lost in the Court below in the absence of a motion for judgment *n. o. v.* made in the District Court within ten days after the reception of the verdict.

Globe Liquor Co. v. San Roman, 332 U. S. 571;
Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212;
Fountain v. Filson, 336 U. S. 681;
Weade v. Dichmann, Wright & Pugh, 337 U. S. 801;
Johnson v. N. Y., N. H. & H. R. Co., 344 U. S. 48.

In each case the question before this Court was whether the Appellate Court could order judgment for a successful appellant on an issue of decisive importance as to which the opposite party had no occasion in the trial Court to exercise his rights under Rule 41(a)(2) of the Federal Rules of Civil Procedure and as to which the trial Judge had no occasion to exercise the discretion vested in him under Rule 50(b) of the Federal Rules of Civil Procedure.

The underlying rationale of the decisions, grounded upon principles of fairness and justice, is that Rule 50(b) should not be construed to deprive litigants the opportunity of making a showing and District Judges the opportunity of exercising the discretionary powers vested in them under Rules 41(a)(2) and 50(b) as to an issue of decisive importance, the legal sufficiency of which was not questioned in the trial Court.

The rationale of the foregoing cases applies with equal, if not greater, force to the instant case which presents the same important problem. Here respondent did not in the trial Court raise the issue of the legal sufficiency of the evidence as to petitioner's case based upon the theory of respondent's own negligence. Consequently, there was no occasion for respondent to make a showing or for the District Judge to exercise the discretionary powers vested in him by Rules 41(a)(2) and 50(b) as to this theory of claim. Therefore, the action of the District Judge in denying the motion for judgment *n. o. v.* made on a ground which questioned only one of the two statements of petitioner's claim was in consonance with the requirements of Rule 50. Compare *U. S. v. Mobile & O. R. Co.* (5th Circuit), 8 F. (2d) 613.

When the Court of Appeals reviewed the legal sufficiency of the evidence not only as to the theory of claim questioned in the Court below but also as to the theory of claim of respondent's own negligence, the case on appeal

thus turned upon a different issue—one not raised or questioned in respondent's motion for judgment *n. o. v.* before the trial Court.

Therefore, when the Court of Appeals reviewed the evidence as to both independent statements of claim and directed entry of judgment for respondent, it held by necessary implication that petitioner, by invoking Rule 8(e) (2) in setting forth in his complaint two statements of claim alternately did so at the risk of having the legal sufficiency of the evidence as to each separate and independent claim of petitioner preserved for review on appeal by the opposite party and of having the entire case subjected to judgment *n. o. v.*, notwithstanding that the opposite party merely questioned the evidence as to only one independent statement of claim and did not direct any motion to the other statement of claim which became of decisive importance.

The true effect of the holding of the Court below would be to strike down the safeguards established by the Rules grounded upon principles of fairness and justice; it would deprive a litigant of the opportunity of presenting reasons to invoke Rule 41(a)(2) and abolish the prerogative of the District Judge to exercise the discretionary powers vested in him under Rule 50(b); it would permit a Court of Appeals to grant judgment *n. o. v.* on grounds not presented or which do not afford a basis for judgment *n. o. v.* in the Court below, notwithstanding the requirement of Rule 50(a) that a "motion for a directed verdict shall state the specific grounds therefor"; and, finally, it would have the effect of restoring the procedural complexities, ambiguities, confusion and uncertainties treated by this Court in *Johnson v. N. Y., N. H. & H. R. Co.*, 344 U. S. 48, which Rule 50 "was adopted to end".

It is respectfully submitted that a Court of Appeals not only lacks the power to direct entry of judgment *n. o. v.* in the absence of a motion for judgment *n. o. v.*, but in the light of Rule 59 of the Federal Rules of Civil Procedure also lacks the power to even go so far as to remand for a new trial. In the case at bar there was not only an absence of a motion for judgment *n. o. v.*, but also an absence of a motion by respondent for a new trial and, of course, more than 10 days had elapsed since the entry of judgment on the verdict in the District Court. Under such circumstances, as stated in *Jackson v. Wilson Trucking Corp.*, 243 F. (2d) 212, in which the Court of Appeals for the District of Columbia reversed the action of the District Court granting a new trial upon denying a motion for judgment *n. o. v.* after the expiration of 10 days from the date of entry of judgment,

> "The precise question has not been decided by the Supreme Court, but the Supreme Court has considered Rule 50(b) in several cases, * * *.
>
> "These cases do not solve our problem, but none of them militates against the solution we reach, and at least they demonstrate that unless a motion for the greater remedy, for judgment *n. o. v.*, is timely filed it may not be granted even though a motion for a new trial has been timely filed. While it does not necessarily follow from the Supreme Court decisions that the lesser remedy may not be granted in the converse situation, we think this does follow from the necessity of giving efficacy to Rule 59(b) and Rule 59(d). They would be largely nullified were it to be held that an ill-founded, though timely, motion for judgment *n. o. v.* under Rule 50(b) must be deemed either to include a motion for a new trial though none be actually filed, or to hold open for more than 10 days the authority of the Court under Rule 59(d) to grant a new trial on its own initiative. * * *"

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review and would be conducive to the fair and efficient administration of justice.

3. The action of the Court below constituted an invasion of the province of the jury, contrary to the Seventh Amendment to the United States Constitution.

The Court below undertook to review not only the evidence on the issue of agency as to which respondent's motion for judgment *n. o. v.* was specifically directed, but also undertook the power to review the evidence for legal sufficiency on the issue of respondent's own negligence as to which no motions for directed verdict, judgment *n. o. v.* or new trial were directed, and remanded the case with directions to enter judgment *n. o. v.* for respondent on the assumption that the evidence was legally insufficient to support either independent claim of petitioner. The petitioner challenges both the power and the assumption of the Court below. He submits that not only did the Court below violate the rule that a Court of Appeals has no power to review the evidence and direct entry of judgment *n. o. v.* in the absence of a motion for judgment *n. o. v.* specifically stating the grounds therefor as to each issue of decisive importance, but also that the verdict of the jury is amply supported by the evidence of record.

The basis of petitioner's claim is that the respondent is liable in damages for the wrongful death of petitioner's intestate because of either (1) respondent's own negligence or (2) the negligence of his alleged agents imputable to respondent under the doctrine of *respondeat superior*. As to the issue of agency, the finding that Barnes was acting as the agent or employee of respondent within the scope of

his agency or employment at the time of the collision is clearly supported by the record evidence of the purpose for which respondent's trucks were used, the *res gestae* statements made by respondent's employee Barnes both when he took the truck and immediately after the collision, and the general authority given by respondent to use the truck in the business of respondent.

The Court below, in concluding that the evidence was insufficient to warrant the jury in holding that Barnes was an agent or an employee of Livingston acting within the scope of his agency or employment at the time of the collision, contrary to established principles of law and invading the province of the jury, judged the credibility of the witnesses and viewed the case in the light most favorable to respondent; it disregarded material evidence of record and relied solely upon the testimony of respondent and his employee Barnes, and upon hearsay and self-serving declarations of respondent Livingston which, over objection of petitioner, were adduced from the testimony of respondent's witness Lowther who, on a previous occasion, had engaged the truck to be used in the business of respondent for a purpose similar to that for which the respondent's truck was used on the occasion in question, and whose testimony that he, in effect, was *particeps criminis* in inducing Barnes to use his employer's truck without permission raised a serious issue as to the credibility of the witness Lowther.

Viewing the case as to the issue of agency, however, in the light most favorable to petitioner, as it must be viewed on appeal, it becomes clear that a finding that Barnes was the agent of respondent at the time of the collision is amply supported by the evidence of record. The facts as adduced at the trial and contained in the record show (1) that respondent's employee Barnes was in the possession of re-

spondent's trucks for the purpose of protecting respondent's interest; that is, for the purpose of towing respondent's stake body truck which had become disabled on the highway in the nighttime; (2) that when Barnes obtained possession of one of respondent's trucks for the purpose of towing back the stake body truck of respondent, he stated to the person whom he requested to accompany him that he was performing this work at the specific instructions of his employer, respondent Livingston, and immediately after the collision he also made the statement to the highway patrolman that he was towing the truck for his employer, the respondent Livingston, all of which clearly presented a jury question under the firmly established principle in South Carolina, as laid down by the Supreme Court of South Carolina in *Chantry v. Pettit Motor Co.*, 156 S. C. 1, 152 S. E. 753, and the cases cited therein, to the effect that "one who is in possession of property of the owner and uses it in the service of the owner is presumptively a servant of the owner." Moreover, both respondent Livingston and Barnes were parties to the action and their testimony, together with the testimony of Lowther, contained self-contradictions and equivocations, was evasive and clouded with uncertainties and generalities, and their demeanor on the stand and manner of testifying gave rise to doubts of their sincerity. Compare *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620; *Quock Ting v. U. S.*, 140 U. S. 417.

Moreover, on the issue of respondent's own negligence, as to which the sufficiency of evidence was not questioned in the trial Court, the evidence of record clearly showed (1) that respondent's stake body truck was without lights and reflectors at the time of the collision which resulted in the death of plaintiff's intestate; (2) that the truck had been in such defective condition for at least a week prior to the collision, at which time respondent's employee was notified

of such defective condition by a highway patrolman; (3) that for some time prior to the collision the respondent Livingston saw or could have seen that the truck was defectively equipped with lights and reflectors; and (4) that respondent allowed the truck to be operated by his employee Barnes on the highway in the nighttime.

Clearly, it would be an undue invasion of the historic function of a jury for an Appellate Court to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence. This is an established rule of judicial review.

Wilkinson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

Therefore, it is respectfully submitted that the Court below by judging the credibility of the witnesses and substituting its view of the case for that of the jury invaded the province of the jury, contrary to the rights of the petitioner under the Seventh Amendment to the Constitution of the United States.

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should affirm and reinstate the judgment of the District Court as to respondent Livingston.

Respectfully submitted,

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